SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

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No. 209

RAILROAD TRANSFER SERVICE, INC., A DELAWARE CORPORATION,

Petitioner,

vs.

THE CITY OF CHICAGO, A MUNICIPAL CORPORATION; RICHARD J. DALEY, NOT INDIVIDUALLY, BUT AS MAYOR OF THE CITY OF CHICAGO; RAYMOND F. SIMON, NOT INDIVIDUALLY, BUT AS CORPORATION COUNSEL OF THE CITY OF CHICAGO; ORLANDO WILSON, NOT INDIVIDUALLY, BUT AS SUPERINTENDENT OF POLICE OF THE CITY OF CHICAGO; AND JAMES CARTER, NOT INDIVIDUALLY, BUT AS PUBLIC VEHICLE LICENSE COMMISSIONER OF THE CITY OF CHICAGO,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

1.

Two major concessions in respondents' brief are not consistent with the opinion of the Court of Appeals. Therefore, the judgment of that Court should be vacated or reversed so that effect may be given to respondents' concessions.

Respondents' brief makes two concessions on major issues. These concessions favor petitioner and are inconsistent with the opinion of the Court of Appeals. The

judgment of that Court should therefore be vacated or reversed in order that a judgment may be entered in the District Court which gives effect to respondents' concessions.

A. In Respect to § 28-6 of the Ordinance.

Respondents say (p. 16) in respect to § 28-6:

> "The *City specifically denies that Transfer must prove 'annually that it is qualified.'* The City has maintained throughout this litigation that it is bound by this Court's determination in *Atchison*, and that the railroads are free to determine who shall transfer passengers between railway stations (R. 136)." (Emphasis is in text.)

Up to now respondents have contended that the ordinance is valid on its face. Their concession must constitute an admission either that the amendment of 1959 to § 28-6 does not in terms apply to petitioner, or that it is invalid on its face as applied to petitioner. The first alternative is not tenable. We have, of course, argued in favor of the second.

Respondents made no corresponding concession in their brief opposing our petition for certiorari, although our argument there against the validity of § 28-6 was the same argument that we now assert in our main brief.

In our second amended complaint, paragraph 18 (R. 11), we alleged as a ground of invalidity of the ordinance in general and of § 28-6 in particular that "[P]laintiff . . . can be denied the right to operate its vehicles by the Public License Commissioner of the City of Chicago (Section 28-6, Municipal Code of the City of Chicago). . . ." The City responded to this in its motion to dismiss. After quoting (pp. 56-57) more than half of a page of the *dissent* in *Chicago* v. *Atchison, Topeka & Santa Fe Railway Co.*, 357

U. S. 77, at 90-91, *without identifying it as dissent*, the City's motion to dismiss argued (p. 57):

> "Thus, the City has the constitutional power of regulation by ordinance over the operation of plaintiff's terminal vehicles.
>
> "The sections of the ordinance referred to, and the allegations contained in paragraphs . . . 18 of the Second Amended Complaint are appropriate and reasonable regulatory measures within the proper scope of the City's aforesaid power of regulation."

The opinion of the Court of Appeals does not reflect any concession by respondents of the character they now present. In a cryptic footnote the Court states: "Chicago now admits that it has no power to stop Transfer's operations" (358 F. 2d at 57 n. 2; R. 150). No source of the authority for this statement is supplied, and any effect it might suggest is overcome by other parts of the opinion. The footnote is appended to the Court's quotation of a letter from the Commissioner to petitioner dated September 15, 1961, advising that unless petitioner complies with the ordinance it must cease and desist from its operations.

The footnote is overcome by the Court's ultimate holding that the ordinance is valid on its face. If it is valid on its face the City can "stop Transfer's operations," as the City argued in its motion to dismiss. The Court's holding is fairly summarized in the following quotations from the opinion: "As written, however, the ordinance does not collide with federal preemption. . . . [T]he ordinance is not offensive on its face. . . . As it stands, the ordinance cannot be unequivocally classified, and, until it is applied, it lacks the test whereby its real nature is revealed." (358 F. 2d at 57, 58; R. 151, 152, 154.)

Whereas the Court held that the ordinance is not invalid on its face, respondents' concession necessarily must be based upon the conclusion that § 28-6 is invalid on its

face because in plain language it requires petitioner to prove each year that petitioner "is qualified to pursue the occupation of" transferring interstate passengers between railroad stations. The exact words of part of respondents' concession are: "The *City specifically denies that Transfer must prove 'annually that it is qualified.'*" (Br. p. 16; emphasis is in text.) Whereas the Court held that "until it is applied" the validity of the ordinance cannot be determined, respondents concede now that § 28-6 is invalid as applied to petitioner.

It is therefore submitted that the judgment of the Court of Appeals should be vacated or reversed in order to permit the District Court to enter a decree that the portion of § 28-6 here in issue is unlawful upon its face and cannot be applied to petitioner, and that the District Court should be instructed to enter such a decree. This is the only way in which respondents' concession can be made effective. As it now stands the opinion of the Court of Appeals presents a major variance from respondents' concession.

B. In Respect to Section 28-30.1.

As to § 28-30.1 respondents state (br. p. 30):

> "Section 28-30.1 was designed to apply only to taxi-cab operators for use in determining rates. It does not apply to petitioner."

This section requires on its face, by force of a 1963 amendment, that petitioner keep accurate books of account at its Chicago office and shall annually on or before May 1 file with the Commissioner a profit and loss statement for the preceding calendar year showing in great detail its earnings and expenses, and its balance sheet at the end of the year; and the Commissioner is granted access to its records. In our main brief we included a copy of § 28-30.1 at pages 21 and 39, and we urged its invalidity as applied

to petitioner at pages 24-25. In our petition for certiorari (pp. 12-13) we made a similar attack upon its validity, but respondents made no similar concession in their brief opposing our petition.

On this issue the Court of Appeals said:

> "To require Transfer . . . to give proof of financial responsibility is but to establish accessible responsibility. Such requirements are reasonably within police powers of promotion of welfare." (358 F. 2d at 58, R. 153.)

Respondents' concession that § 28-30.1 does not apply to petitioner must be taken as meaning that this section cannot lawfully be applied to petitioner. Respondents cannot properly say that § 28-30.1 does not in terms apply to petitioner since by force of the 1963 amendment it plainly does. See our main brief, pages 6, 21, 24-25. Contrary to respondents' statement (br. pp. 30-31), the use of the term "corporation" in the 1963 amendment does not serve "to include both individual and corporate taxicab operators," since by plain definition the word "cabman" in § 28-30.1, before the 1963 amendment, included both individual and corporate taxicab operators. By § 28-1 (R. 27) "cabman" was defined as a *person* engaged as a proprietor in operating taxicabs, and the definition of *person* included a corporation.

Additionally, the 1963 amendment not only added the word "corporation" to § 28-30.1; it also added a third paragraph laying additional obligations *only on cabmen*. See our main brief, pages 21-22, and R. 43. The term "corporation" applies to corporations subject to Chapter 28. Thus, the 1963 amendment made petitioner, as such a corporation, subject to the first two paragraphs of § 28-30.1, but it made "cabmen," and not corporations generally, subject to the third paragraph also. This exercise of selectivity by the City Council shows that it intended to bring

all corporations subject to Chapter 28, and not already included as "cabmen," within the coverage of the first two paragraphs of § 28-30.1, while making only taxicab operators subject also to the third paragraph. *California* v. *Taylor*, 353 U. S. 553, 564-565 (1957).

We submit that the Court should take the same action in respect to § 28-30.1 as we have requested as to § 28-6.

Despite respondents' concessions, it seems appropriate to reply to other parts of respondents' brief.

2.

Section 28-6 as amended in 1959 is entirely different in wording and in legal consequences from what it was before the amendment.

Respondents argue (br. p. 14) that "Section 28-6 . . . is substantially the same now as when Transfer first attacked the validity of Chapter 28 in 1956." (The suit was actually commenced in 1955. 240 F. 2d at 933.) Proceeding from that premise (pp. 14-25) respondents contend that petitioner's attack on § 28-6 is barred because all of Chapter 28 except § 28-31.1, the public convenience and necessity requirement, was held valid in *Atchison*, 357 U. S. 77 (1958). This contention is without merit because the premise is erroneous.

As shown in our main brief, pages 15-17, the 1959 amendment added to § 28-6 an entirely new provision, that an applicant for a public passenger vehicle license must show that it "is qualified to pursue the occupation of a cabman or coachman." By definition "coachman" includes one who carries passengers between railroad stations. It is this new 1959 provision that is in issue here. The new

phrase in § 28-6 plainly calls for a discretionary judgment by the Commissioner. Judicial construction of similar phraseology in statutes so holds.

Associated Transport, Inc. v. *Fowler,* 206 Tenn. 642, at 645-647; 337 S. W. 2d 5, at 6-7 (1960), construed a Tennessee statute providing that a certificate of convenience and necessity to operate as a motor common carrier, issued by the Tennessee Service Commission, could be transferred only "if the commission shall be of the opinion that the purchaser thereof is in all respects qualified under the provisions of this chapter, to conduct the business of a motor carrier within the meaning thereof." The Commission denied the application to transfer and the Court sustained the Commission, holding that under the "clear meaning" of the statute the Commission had the same discretion to deny the transfer as it had to deny an original application for a certificate of convenience and necessity.

Trusteed Funds, Inc. v. *Dacey,* 160 F. 2d 413 (1st Cir. 1947), considered the Federal statute which compels in proper circumstances restoration of a discharged soldier to his former civilian position. The employee seeking his old job must establish that he "is still qualified to perform the duties of such position." The District Court had ruled that this phrase "means simply physically and mentally qualified" and ordered restoration (p. 420). The Court of Appeals reversed, holding that this construction was too narrow and that the phrase gave the Courts discretion to consider the whole area of "qualification" including "mental and temperamental elements consistent with harmonious relations and mutual trust and confidence on the part of the several managers who must work together" (p. 421).

Section 28-6 in its pre-1959 form regulated the interstation transfer service while Parmelee Transportation Co. was performing it for the railroads. Apparently, in the

opinion of the City Council, § 28-6 in its pre-1959 form was adequate for that purpose. When Parmelee's contract was terminated in 1955, the City Council passed the public convenience and necessity section which was adjudged unlawful in *Atchison*, 357 U. S. 77, 80, 84 (1958). The *Atchison* decision, in 1958, restored the regulatory *status quo* that had existed before 1955; it made the regulatory provisions of Chapter 28 just the same for petitioner as they had been for Parmelee before 1955. But the City Council was not content with that. In 1959 the Council repealed the outlawed public convenience and necessity section which applied to petitioner, but by the same ordinance it added the provision to § 28-6 that requires petitioner every year to prove to the satisfaction of the Public Vehicle License Commissioner that petitioner "is qualified to pursue the occupation of" transferring passengers between railroad stations.

In these circumstances the plain legislative intent to add a new requirement to § 28-6 cannot be disregarded. The governing principle was stated in *Acme Fireworks Corp.* v. *Bibb*, 6 Ill. 2d 112, 117, 126 N. E. 2d 688, 690-691, 127 N. E. 2d 444 (1955):

> "When dealing with the construction and interpretation of amendatory acts, we have many times held that the presumption is that every amendment of a statute is made to effect some purpose, and that effect must be given the amended law in a manner consistent with the amendment."

To the same effect is *United States* v. *McClure*, 305 U. S. 472, 477 (1939).

Respondents state (Br. p. 16) that unlike § 28-31.1, held invalid in *Atchison*, § 28-6 does not single out petitioner's 20 vehicles, since § 28-6 "was designed to apply to the thousands of other public passenger vehicles which are regulated by Chapter 28." In practical effect, however, the

1959 amendment to § 28-6 does single out petitioner's vehicles. The "thousands of other" vehicles are mostly taxicabs (R. 72). For many years, and before 1955, taxicab operators were, and they still are, subject to §28-22.1 which requires a cab company to prove public convenience and necessity for every cab put in operation (R. 24-25, 29). The outlawed § 28-31.1 was copied directly from 28-22.1 (compare the two, R. 24-25 and R. 26). Up to 1959 § 28-22.1, and § 28-6 before the 1959 amendment, were considered adequate for regulation of taxicabs; and up to 1959 § 28-6 alone and unamended was considered adequate for regulation of all vehicles except taxicabs and terminal vehicles. But when in 1958 § 28-31.1, which applied only to petitioner's terminal vehicles, was held invalid, the City proceeded in 1959 to amend § 28-6 by requiring proof "that the applicant is qualified to pursue the occupation of a cabman or coachman." The only carrier affected by the invalidity of § 28-31.1 was petitioner; all other types of city regulated carriers were still as fully regulated as they ever had been. So the City filled that single void by amending § 28-6. A cabman who had to prove public convenience and necessity was hardly affected by the amendment to 28-6.

3.

The circumstances under which petitioner obtained licenses in 1960 are not a "measure of what it has to do to comply with the City's ordinance" (Resp. br. p. 10).

Respondents point out (Br. pp. 10-13) that petitioner obtained licenses in 1960, and they argue that "what it did to obtain those licenses is the best measure of what it has to do to comply with the City's ordinance." That is plainly not correct. Every year, irrespective of what has happened before, petitioner is faced with the express requirement of § 28-6 that it must prove to the satisfaction

of the Public Vehicle License Commissioner that it is "qualified to pursue the occupation of" transferring passengers between railroads stations in order to obtain licenses. The fact that an unlawful demand for a local license to engage in interstate commerce has been complied with, and the license granted, does not establish that the license requirement is not an unconstitutional burden on interstate commerce, nor is the licensee foreclosed from contesting the validity of future application of the ordinance. *Adams Express Co.* v. *New York*, 232 U. S. 14, at 29-30, 31 (1914); *Harman* v. *Chicago*, 147 U. S. 396, at 398-399 (1893).

In September 1961, the Public Vehicle License Commissioner wrote to petitioner that unless it "fully complied" with the ordinance it must cease and desist from its operations (R. 127-128). As to this the District Court said: "Defendant now concedes that the threat made in this letter was an idle threat, and that under the ruling in the *Atchison* case, the City would have no right to issue a 'cease and desist' order" (R. 136).

Despite this concession, however, the District Court held the ordinance valid on its face. So did the Court of Appeals. Both Courts held that no controversy could arise until some part of the ordinance was actually enforced against petitioner. Thus, despite this concession, the judgment of the Court of Appeals remains that the ordinance is not invalid on its face.

Moreover, despite this concession respondents continued, until the concessions set forth in our part 1 above, to contend that the ordinance was valid on its face.

4.

Contrary to respondents' assertions, petitioner has contested the validity of section 28-6 from the beginning of this litigation and on the same grounds that are presented in the petition for certiorari.

Respondents assert (Br. pp. 14, 23, 24) that petitioner's present "characterization" of § 28-6 first appeared in the petition for certiorari. That is not correct. The excerpt from our second amended complaint which is quoted in respondents' brief, page 23, as our "characterization" of § 28-6, is incomplete. Paragraph 9 of our second amended complaint (R. 9) alleges, referring generally to Chapter 28, "That said ordinance gives the Commissioner and/or the Mayor discretionary authority to . . : deny licenses to plaintiff without hearing and without relationship to the safety of plaintiff's operations . . .," and that this obstructs interstate commerce in violation of §§ 1(4), 3(4), and 202(c) of the Interstate Commerce Act. Paragraph 18 (R. 11) alleges in part:

> "[T]hat plaintiff is the only operator of motor vehicle buses for the transportation of passengers to and from points and places using the streets of the City of Chicago which can be denied the right to operate its vehicles by the Public License Commissioner of the City of Chicago (Section 28-6, Municipal Code of the City of Chicago) . . ."

In their motion to dismiss our second amended complaint respondents said in part (R. 57):

> "The sections of the ordinance referred to, and the allegations contained in paragraphs 7, 8, 9, 16, 17 and 18 of the Second Amended Complaint are appropriate reasonable regulatory measures within the proper scope of the City's aforesaid power of regulation."

In the District Court and in the Court of Appeals petitioner pressed its claim that the ordinance as a whole and § 28-6 in particular were unlawful upon their face because they gave the City discretionary authority to deny petitioner the right to operate. Both Courts brushed aside this argument on the grounds that the ordinance was not invalid on its face and that the City had not actually prevented petitioner from operating. The District Court summarized its holding by saying: "Plaintiff's attorneys state that the ordinance is a specter over plaintiff's head; until the City rattles its chains of interference with interstate commerce, the plaintiff cannot complain" (R. 144).

Respondents' argument seems actually to be that petitioner's argument here on the validity of § 28-6 is more elaborate than in the Courts below. But "Parties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed," *Dewey* v. *Des Moines*, 173 U. S. 193, 198 (1899); *Sanders* v. *United States*, 373 U. S. 1, 16 (1963).

5.

Petitioner has good reason to be apprehensive of interference by the City with its operations, and to take prompt defensive measures.

It must not be overlooked that the City has engaged in intentional and unlawful harassment of petitioner with the avowed purpose of denying petitioner the right to operate in order to force the railroads to employ Parmelee Transportation Co. Petitioner has good reason to be apprehensive of any action by the City that resembles what happened in 1955.

The history of the 1955 ordinance is recounted in *Atchison*, 357 U. S. 77, at 79-81. More details of the events of 1955 are set forth in the opinion of the Court of Appeals

that was affirmed in *Atchison*, 240 F. 2d 930, at 935-936, 939. This opinion, summarizing the undisputed evidence, shows that the 1955 ordinance was prompted by a "communication" from Parmelee to the Public Vehicle License Commissioner which was passed on to the chairman of the local transportation committee of the Chicago City Council. Acting promptly in response to that "communication," the committee, with the active aid of the City corporation counsel's office, devised the 1955 ordinance with the sole purpose of putting petitioner out of business and shackling Parmelee's services to the railroads in perpetuity. Pertinent extracts from the opinion of the Court of Appeals are set forth in Appendix A to this brief. That material, together with this Court's account of the events, is, we submit, convincing evidence of the facts of life in Chicago that justified the institution of the case at bar.

Parmelee, it may be noted, was big business. It was a principal part of the complex of companies which owned and operated most of the taxicabs in Chicago, Pittsburgh, Minneapolis, and other cities. *United States* v. *Yellow Cab Co.*, 332 U. S. 218, at 221-223 (1947).

In the *Atchison* litigation the City played what seemed like a deliberate cat-and-mouse game with petitioner. In the District Court and in the Court of Appeals the City stoutly contended that § 28-31.1, the public convenience and necessity requirement, applied to petitioner. But in this Court the City argued at length that the question of applicability was so uncertain that the case ought to be remanded to the District Court, to be held there while the parties sought adjudication in the Illinois courts to determine whether § 28-31.1 did apply to petitioner. See *Atchison*, 357 U. S. at 84. This Court refused that request.

And in this Court the City, backing away from the adamant position it had maintained under its motion for summary judgment in the two Courts below, sought re-

versal with the representation that it would not apply § 28-31.1 to petitioner as written but would only use it in the lawful exercise of its police power. This Court responded:

> "Although counsel for the City denies that it will use this power to exclude proposed transfer operations wholly or primarily because of economic considerations . . . , it is clear that the City claims at least some power under § 28-31.1 to decide whether a motor carrier may transport passengers from one station to another."

The ink was hardly dry on this Court's mandate in *Atchison* before the City began its course of legislation that led to the case at bar.

CONCLUSION.

In *Atchison* this Court recognized that an ordinance that is invalid on its face, and thereby offers a continuing threat, should be enjoined from enforcement irrespective of the representations of the City that it will not employ the ordinance for unlawful purposes. The same course should be followed here.

The Court should vacate or reverse the judgment of the Court of Appeals and remand the cause to the District Court with instructions to enter a judgment holding that the provision of § 28-6 which requires petitioner to establish that it is "qualified to pursue the occupation of a . . . . coachman," and § 28-30.1, are invalid on their face, in accordance with respondents' concessions. The Court should reverse the judgment of the Court of Appeals holding valid the requirements that petitioner must maintain its principal place of business in Chicago and employ only chauffeurs residing in Chicago.

Respectfully submitted,

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APPENDIX.

Extracts From the Opinion of the Court of Appeals for the 7th Circuit in Atchison, Topeka & Santa Fe Ry. Co. v. City of Chicago, 240 F. 2d 930 (1957).

935

At the meeting of the committe on local transportation of the Chicago city council held on July 21, 1955, the chairman stated that recently he had been advised by the Vehicle License Commissioner that he had received a communication from Parmelee advising that its contract with the railroads was to be canceled out in September of that year, "which would make it appear that the railroads were taking the position of dictating who would or could operate terminal vehicles in Chicago; that he did not think that was right and had prepared an ordinance with the assistance of Mr. Gross, and had it introduced in the city council and referred it to the committee; that subsequently he had discussed said ordinance with Mr. Grossman of the corporation counsel's office and that as a result of his conference with Mr. Grossman, it would appear that, while he was on the right track in the matter, his method of approach was wrong."

Mr. Grossman informed the committee that he had looked over the ordinance "as introduced" by the chairman and was of the opinion that it was not in proper form; but that he believed the objective could be obtained in some other way. He said he would endeavor to prepare and submit an ordinance on this subject.

The chairman's proposed ordinance, which met with Mr. Grossman's objection as to form, and which was laid

aside, in brief would have granted an exclusive franchise for ten years to Parmelee for the operation of terminal vehicles to transfer passengers and their baggage between railroad stations.[12]

On July 26, 1955, the chairman stated that the committee was in session to receive a report from Mr. Grossman who had prepared a substitute ordinance which would accomplish what the committee had in mind, namely, placing the licensing and operation of terminal vehicles under the complete control of the city of Chicago, whereas, as the code then provided, the only one who could secure a license for the operation of a terminal vehicle was someone who had a contract with the railroads.

936

On recommendation of the committee, the council on the same day passed the ordinance now under attack.[13]

939

At meetings of the committee which recommended the 1955 ordinance for passage, the committee chairman made it clear that the objective sought was the assumption by the city of the authority to designate the instrumentality

12. § 2 read: "Subject to all the conditions of this ordinance, exclusive permission and authority is hereby granted to the licensee to operate terminal vehicles in the City for a period of ten (10) years, commencing on * * *, 1955, and ending on * * *, 1965."

§ 4 provided: "It is unlawful for any person to be an operator of one or more terminal vehicles on any public way from place to place within the corporate limits of the city unless such terminal vehicles are licensed by the City as terminal vehicles. * * *"

§ 11 provided: "Upon the effective date of this ordinance, the commissioner shall issue licenses hereunder to licensee in not to exceed the number of licenses held by such licensee on April 1, 1955. * * *"

13. Herein sometimes referred to as the 1955 ordinance.

which was to operate terminal vehicles between railroad stations in Chicago. The proceedings of the committee fail to indicate that the chairman or any member of the committee was interested in traffic regulations or any other aspect of the city's police power.